



Georgetown University Law Center  
**Scholarship @ GEORGETOWN LAW**

---

2015

## Risks, Goals, and Pictographs: Lawyering to the Social Entrepreneur

Alicia E. Plerhoples

*Georgetown University Law Center*, [aep65@law.georgetown.edu](mailto:aep65@law.georgetown.edu)

This paper can be downloaded free of charge from:  
<https://scholarship.law.georgetown.edu/facpub/1471>  
<http://ssrn.com/abstract=2583737>

---

Lewis & Clark L. Rev. (forthcoming)

This open-access article is brought to you by the Georgetown Law Library. Posted with permission of the author.  
Follow this and additional works at: <https://scholarship.law.georgetown.edu/facpub>



Part of the [Legal Education Commons](#), [Legal Profession Commons](#), and the [Legal Writing and Research Commons](#)

## **Risks, Goals, and Pictographs: Lawyering to the Social Entrepreneur**

**Alicia E. Plerhoples\***

INTRODUCTION .....	2
I. LEGAL REPRESENTATION IN THE CLINIC.....	3
II. PLAUSIBLE RISK PROFILES .....	5
A. STUDENT ATTORNEYS .....	5
1. <i>Risk-Averse Individuals Self-Select into Practicing Law</i> .....	5
2. <i>Law School Curriculum Instills Risk Aversion</i> .....	5
3. <i>Lawyers Are Risk Averse to Protect Themselves</i> .....	6
B. SOCIAL ENTREPRENEURS .....	7
III. LAWYERING IN THE CLINIC.....	8
A. BUSINESS LAWYERING SKILLS .....	8
1. <i>Strategic-Planning Skills</i> .....	9
2. <i>Problem-Solving Skills</i> .....	9
3. <i>Interpersonal Skills</i> .....	10
4. <i>Analytical and Decision-Making Skills</i> .....	10
5. <i>Research, Writing, and Presentation Skills</i> .....	10
B. THE CLIENT-CENTERED APPROACH.....	10
IV. IDENTIFYING A SOCIAL ENTREPRENEUR'S GOALS .....	13
V. PICTOGRAPHS AND SOCIAL ENTREPRENEURS: MINI-CASE STUDIES .....	15
A. COUNSELING THE DUAL-MISSION SOCIAL ENTREPRENEUR .....	15
B. COUNSELING THE MISSION-DRIVEN SOCIAL ENTREPRENEUR.....	21
VI. CONCLUSION.....	24

---

\* Alicia E. Plerhoples, Associate Professor of Law, Georgetown University Law Center. This Essay was presented at the Business Law Fall Forum at Lewis & Clark Law School. I would like to thank Susan Felstiner, Jay Mitchell, Patience Crowder, Praveen Kosuri, Esther Barron, Deborah Burand, Cynthia Laury Dahl, Jonathan Ng, and Jennifer Fan for their insightful comments. I am also grateful to Paul Tremblay and Alicia Alvarez for writing *Introduction to Transactional Lawyering Practice*. This textbook for transactional law clinics has helped me shape my clinical pedagogy. For helpful research assistance, I am grateful to Georgetown Law students Cindy Woods and Kaela Colwell.

## INTRODUCTION

Scholars have argued that transactional lawyers add value by mitigating the potential for post-transaction litigation, reducing transaction costs, acting as reputational intermediaries, and lowering regulatory costs.<sup>1</sup> Effective transactional attorneys understand their clients’ businesses and the industries or contexts in which those businesses operate.<sup>2</sup> Applied to the start-up social enterprise context, understanding the client includes understanding the founders’ values, preferences, and proclivity for risk. The novel transactions and innovative solutions pursued by emerging social entrepreneurs may not lend themselves well to risk avoidance. For example, new corporate forms such as the benefit corporation are untested, yet appeal to many social entrepreneurs who wish to use a single entity to pursue dual missions. Novelty in a transaction or governance arrangement, as opposed to precedent, means that the risk of litigation or regulatory inquiry may rise. However, a lawyer—and particularly the student attorney without practice experience—may be prone to risk aversion. Lawyers are often described by themselves and by others as “conservative, risk-averse, precedent-bound, and wedded to a narrow, legalistic range of problem solving strategies.”<sup>3</sup> On one hand, risk aversion can inhibit a lawyer’s ability to “think outside the box” and take the innovative approaches that their social enterprise clients need. On the other hand, a lawyer’s risk aversion may add value to a social enterprise to the extent that the lawyer can be a “sounding board to help clients balance risk-prone ideas.”<sup>4</sup>

In the Social Enterprise & Nonprofit Law Clinic at Georgetown Law, student attorneys learn to practice client-centered lawyering in their representation of social enterprise clients. In this Essay, I discuss (i) plausible risk profiles of student attorneys and their social enterprise clients; (ii) a client-centered lawyering approach that deters a student attorney from projecting her own risk aversion onto her clients and allows her to act as a “sounding board” armed with legal analysis to help her client make informed decisions; and (iii) one of the counseling tools that facilitates this client-centered approach. The counseling tool—a pictograph, or visual representation that communicates three-dimensional

---

<sup>1</sup> See generally George W. Dent, Jr., *Business Lawyers as Enterprise Architects*, 64 BUS. LAW. 279 (2009); Ronald J. Gilson, *Value Creation by Business Lawyers: Legal Skills and Asset Pricing*, 94 YALE L.J. 239 (1984); Steven L. Schwarcz, *Explaining the Value of Transactional Lawyering*, 12 STAN. J.L. BUS. & FIN. 486, 487–89 (2007).

<sup>2</sup> Dent, *supra* note 1, at 310 (arguing that a business lawyer “must understand the business context in which the client operates”).

<sup>3</sup> Paul Brest & Linda Krieger, *On Teaching Professional Judgment*, 69 WASH. L. REV. 527, 541 (1994).

<sup>4</sup> Schwarcz, *supra* note 1, at 495.

qualitative information—dictates that the client’s preferences take priority over the student attorney’s risk profile, but also allows the student attorney to present and frame the advantages and disadvantages of a particular decision point in relation to the client’s expressed goals.

## I. LEGAL REPRESENTATION IN THE CLINIC

The Social Enterprise & Nonprofit Law Clinic provides pro bono legal services to social enterprises and nonprofit organizations, which are often unrepresented due to the high cost and unavailability of legal services. The clinic’s clients work in a wide range of fields including education, youth development, information technology, food safety and security, sustainable agriculture, prisoner reentry, financial literacy, economic and international development, and civil rights.<sup>5</sup>

There is no universal definition of social enterprise. Because of the clinic’s educational and social mission, the clinic defines social enterprise more narrowly than some. For the clinic’s purposes, a social enterprise commits to (i) an internal positive impact in the way that the social enterprise operates, treats employees, engages in production, and selects materials and other factors of production; (ii) an external positive impact in what the social enterprise contributes to the environment, the communities in which it operates, and/or humanity; and (iii) legal and ethical accountability in the social enterprise’s incorporation documents, mission statements, stated values, and governance policies and practices. Additionally, social enterprises generally (i) apply entrepreneurial approaches to addressing social, environmental, and human justice issues; (ii) have a primary purpose *beyond* making money for individual owners and investors; and (iii) set as a primary goal improvement of the environment, humanity, and/or community.<sup>6</sup> During the clinic’s inaugural year, 18 third-year clinic students provided 5,477 hours of pro bono legal services to 19 social enterprises and nonprofit organizations.<sup>7</sup>

---

<sup>5</sup> For further discussion of the clinic’s legal services and representations, see SOC. ENTER. & NONPROFIT LAW CLINIC, GEORGETOWN LAW, A REWARDING INAUGURAL YEAR: ANNUAL REPORT 1–2 (2014) [hereinafter SOC. ENTER. & NONPROFIT LAW CLINIC REPORT], *available at* <http://www.law.georgetown.edu/academics/academic-programs/clinical-programs/our-clinics/social-enterprise/upload/Georgetown-Social-Enterprise-Nonprofit-Law-Clinic-2014-Annual-Report.pdf>.

<sup>6</sup> *Id.* at 2; *see also Social Enterprise and Nonprofit Clinic*, GEORGETOWN LAW, <http://www.law.georgetown.edu/academics/academic-programs/clinical-programs/our-clinics/social-enterprise/>.

<sup>7</sup> SOC. ENTER. & NONPROFIT LAW CLINIC REPORT, *supra* note 5, at 1.

Clinic students assume the role of lead attorney to their clients, representing them on a variety of business and transactional matters under the close supervision of a professor and one or more teaching fellows. For example, student attorneys have provided legal advice to a South American social enterprise interested in expanding operations to the United States. The South American company facilitates impactful, long-term volunteer projects between corporations and communities in need. Clinic students counseled the social enterprise’s executive director on options for launching the U.S. program, including entity options and how to structure the relationship between the South American and U.S. entities.

As another example, clinic students also represented Aloetree, Inc. as it became the first benefit corporation formed in the District of Columbia. Benefit corporations are required to (i) create a material positive impact on society and the environment; (ii) retain a board of directors which considers the effects of its actions upon its stakeholders, such as employees and customers; and (iii) publicly report its social and environmental performance using a third party standard.<sup>8</sup> Aloetree, Inc. produces and sells children’s clothing to raise funds to support anti-trafficking programs in Cambodia.<sup>9</sup> Clinic students also advised Aloetree’s founder on implementation of a social-impact strategy, emphasizing transparency and accountability to Aloetree’s values-based mission.

## II. PLAUSIBLE RISK PROFILES

### A. *Student Attorneys*

The idea that lawyers are risk averse is often presented in legal scholarship as fact, with little to no empirical or anecdotal evidence. However, when legal scholarship speaks to the causes of such risk aversion, three main arguments emerge: (1) a person’s risk-averse personality leads her to choose pursuing a career in the legal profession; (2) the legal profession in and of itself teaches law students to become risk averse; and (3) risk aversion is a reaction to the steep civil and criminal liability—as well as professional admonishment, including disbarment—faced by practicing lawyers.

---

<sup>8</sup> D.C. CODE §§ 29-1301.01 to 29-1304.01 (2001).

<sup>9</sup> See *Working Together to End Child Trafficking*, ALOETREE (Nov. 13, 2014), <http://www.aloetreekids.com/blog/working-together-to-end-child-trafficking>.

### *1. Risk-Averse Individuals Self-Select into Practicing Law*

A lawyer’s proclivity to be risk averse is sometimes characterized as an inherent trait that helped motivate the lawyer to enter the legal profession. Jonathan Macey posits that risk-taking and entrepreneurship are not qualities likely to be found within the cohort of persons opting to attend law school, making it “quite likely that those who select for law school are somewhat more risk-averse.”<sup>10</sup> Macey argues that this generalization is confirmed by the empirical results finding “small positive returns associated with an investment in going to law school.”<sup>11</sup> Because the law is a profession that is generally thought to provide its members with a “comfortable” standard of living and a steady job, and is also not thought of as providing much opportunity for creative expression, those that chose to attend law school are playing it safe.<sup>12</sup> In addition, Macey argues that the decision to attend law school is a costly means to postpone making an ultimate career decision and therefore is a “hedging strategy” in which “a law degree provides the law student with a ‘put option’ whose terms permit the student to pursue a wide variety of careers, while retaining the option to ‘put’ herself into a career in law should the other options prove unattractive.”<sup>13</sup> More succinctly, “as an occupation, law delivers relatively certain payoffs (status, expected income, the approval of one’s family) while withholding the higher, though less likely, gains available in other endeavors (business enterprises, the creation of art).”<sup>14</sup> Additionally, scholars often cite a 1990 Johns Hopkins study regarding depression across professions, finding the highest rate of clinical depression within the legal profession and leading to the conclusion that lawyers are a more pessimistic lot than other professions, possibly contributing to the overall risk-averse nature of the legal profession.<sup>15</sup>

### *2. Law School Curriculum Instills Risk Aversion*

Some, most notably Paul Brest and Linda Krieger, view the curriculum of law school as stunting and spurning risk-taking proclivity. According to Brest and Krieger, “[t]he appellate case method and adversarial legal processes in general train lawyers to be more adept at criticizing ideas than at creating them. The

---

<sup>10</sup> Jonathan R. Macey, *Lawyers in Agencies: Economics, Social Psychology, and Process*, LAW & CONTEMP. PROBS., Spring 1998, at 109, 110.

<sup>11</sup> *Id.* at 111.

<sup>12</sup> *See id.* at 110–11.

<sup>13</sup> *Id.* at 111.

<sup>14</sup> Anita Bernstein, Essay, *Pitfalls Ahead: A Manifesto for the Training of Lawyers*, 94 CORNELL L. REV. 479, 500 (2009).

<sup>15</sup> *See* Richard G. Uday, *That Frayed Rope*, UTAH B.J., Jan. 2003, at 8, 8.

tendency to criticize ideas prematurely inhibits generating a rich and varied array of potential solutions or alternative courses of action.”<sup>16</sup> Lawyers are seen as “precedent-bound, and wedded to a narrow, legalistic range of problem solving strategies.”<sup>17</sup>

3. *Lawyers Are Risk Averse to Protect Themselves from Professional Admonishment and Civil and Criminal Liability*

Another theory regarding the risk aversion of lawyers is the prospect of losing one’s privilege to work as a lawyer through disbarment or the prospect of facing professional admonishment or civil or criminal liability for malpractice.<sup>18</sup> The breadth of regulation and negative repercussions for legal malpractice instills a sense of risk aversion in practicing lawyers, particularly corporate lawyers whose clients tend to be savvy consumers of legal services and thus more readily able to identify or claim malpractice. Marcel Kahan and Michael Klausner make the argument that, unlike an investor or other business client who can diversify her risk, to the extent that a lawyer cannot diversify career risk, the lawyer will be more risk averse than her clients.<sup>19</sup> Not only are corporate lawyers generally risk averse, this risk aversion leads them to fear “legal change and innovation,” recommending “boilerplate standardized agreements and arrangements rather than customized and more optimal contractual solutions.”<sup>20</sup> Non-standard, innovative business forms are thus usually pushed to the wayside in favor of sub-optimal business forms that have a long history of case law. Standard articles of association and other legal materials provide corporate lawyers with a “feeling of alleged legal certainty and comfort.”<sup>21</sup> Donald Langevoort and Robert Rasmussen echo this claim: “[O]verstatement of legal risk may be a natural by-product of professional self-interest and self-definition.”<sup>22</sup>

---

<sup>16</sup> Brest & Krieger, *supra* note 3, at 541.

<sup>17</sup> *Id.*

<sup>18</sup> Bernstein, *supra* note 14, at 486–92.

<sup>19</sup> See Marcel Kahan & Michael Klausner, *Path Dependence in Corporate Contracting: Increasing Returns, Herd Behavior and Cognitive Biases*, 74 WASH. U. L.Q. 347, 354 (1996).

<sup>20</sup> Francisco Reyes & Erik P.M. Vermeulen, *Company Law, Lawyers and “Legal” Innovation: Common Law Versus Civil Law*, 28 BANKING & FIN. L. REV. 433, 465 (2013).

<sup>21</sup> *Id.*

<sup>22</sup> Donald C. Langevoort & Robert K. Rasmussen, *Skewing the Results: The Role of Lawyers in Transmitting Legal Rules*, 5 S. CAL. INTERDISC. L.J. 375, 375 (1997).

*B. Social Entrepreneurs*

The risk profiles of lawyers seemingly contrast sharply with their social enterprise clients. In *How to Change the World: Social Entrepreneurs and the Power of New Ideas*, David Bornstein reports the results of his extensive interviews with social entrepreneurs across the world.<sup>23</sup> Based on his research, he concludes that successful social entrepreneurs bear six traits: (1) willingness to self-correct, (2) willingness to share credit, (3) willingness to break free of established structures, (4) willingness to cross disciplinary boundaries, (5) willingness to work quietly, and (6) strong ethical impetus.<sup>24</sup> Bornstein describes the “[w]illingness to [b]reak [f]ree of [e]stablished [s]tructures” as requiring “action-oriented individuals” who “test and market new ideas.”<sup>25</sup> With such tests come failures but also the opportunity to learn from such failures and improve the next idea. Bornstein further argues that the innovation that social entrepreneurs seek to create requires “the ability to separate from the past” and from the orthodoxy of institutions.<sup>26</sup> In breaking with tradition and the confines of institutions, social entrepreneurs often “assume considerable financial and professional risk.”<sup>27</sup>

Bornstein also describes the “[w]illingness to [c]ross [d]isciplinary [b]oundaries” in risk-seeking terms:

Independence from established structures not only helps social entrepreneurs wrest free of prevailing assumptions, it gives them latitude to combine resources in new ways. Indeed, one of the primary functions of the social entrepreneur is to serve as a kind of social alchemist: to create new social compounds; to gather together people’s ideas, experiences, skills, and resources in configurations that society is not naturally aligned to produce.<sup>28</sup>

In sum, innovation requires creativity and subjects the innovator to risks. Social entrepreneurs, by pursuing innovation to make a social impact, may tolerate and perhaps even seek risk more than the lawyers who represent them.

---

<sup>23</sup> DAVID BORNSTEIN, *HOW TO CHANGE THE WORLD: SOCIAL ENTREPRENEURS AND THE POWER OF NEW IDEAS* xix–xxi (2007).

<sup>24</sup> *Id.* at 238–246.

<sup>25</sup> *See id.* at 241.

<sup>26</sup> *See id.*

<sup>27</sup> *See id.*

<sup>28</sup> *Id.*



However, in my own anecdotal experience, I have observed a range of social entrepreneurs that reflect different risk profiles. For the purposes of this Essay, I describe just two risk profiles of social entrepreneurs with the recognition that my descriptions are simplistic and overbroad, but not intended to pass judgment on either. The clinic represents a variety of social enterprise clients and tailors such representation to each client’s goals as discussed in Part III.

First, there exists the dual-mission social entrepreneur who wants to make a meaningful contribution to the world, but also wants to make a comfortable living. This may be a recent college or MBA graduate who wants to be the next Blake Mycoskie, the founder of TOMS Shoes.<sup>29</sup> While this type of social entrepreneur may be risk tolerant or risk seeking, she may only be so to the extent that the potential for financial and psychic rewards is high.<sup>30</sup> This social entrepreneur may trade-off the potential for rewards for stability and predictable returns. This social entrepreneur is not unlike the law student.

Other social entrepreneurs may have a deeper appreciation for the sacrifices that are often made to achieve a lasting and significant social impact. This social entrepreneur is willing to sacrifice personal financial gain and constrain the social enterprise in order to achieve social impact. According to Bornstein and based on his interviews, “successful [social] entrepreneurs were the ones most determined to achieve a long-term goal that was deeply meaningful to them. . . . [T]hey valued long-term considerations over short-term gain.”<sup>31</sup> This social entrepreneur may be more risk tolerant or risk seeking to the extent that long-term social impact is achievable. This social entrepreneur is often labeled a “true” social entrepreneur because she is mission-driven.<sup>32</sup> In my experience, however, the dual-mission social entrepreneur is no less earnest in her pursuit of social impact. Both are realist in their own ways.

### III. LAWYERING IN THE CLINIC

The dissimilarity or similarity of student attorneys and their clients does not, by itself, presuppose or predict either a positive or negative legal representation or attorney-client relationship. A lawyer’s risk aversion may add

---

<sup>29</sup> Blake Mycoskie, TOMS, <http://www.toms.com/blakes-bio>.

<sup>30</sup> Brian Galle, *Keep Charity Charitable*, 88 TEX. L. REV. 1213, 1222–23 (2010) (discussing the psychic rewards or “warm glow” that employees receive from working at a nonprofit); Usha Rodrigues, Response, *The Power of Warm Glow*, 88 TEX. L. REV. SEE ALSO 149, 152 (2009) (responding to Galle’s article and articulating the “warm glow” that donors receive when donating to a nonprofit).

<sup>31</sup> BORNSTEIN, *supra* note 23, at 238.

<sup>32</sup> See, e.g., Keren G. Raz, *Toward an Improved Legal Form for Social Enterprise*, 36 N.Y.U. REV. L. & SOC. CHANGE 283, 287–88 (2012).

value to the social enterprise to the extent that the lawyer acts as a “sounding board to help clients balance risk-prone ideas.”<sup>33</sup> And yet, no client wants a naysayer as a counselor. To act as a “sounding board” rather than a naysayer, an effective business lawyer has the following skill set at her disposal: (i) strategic-planning skills; (ii) problem-solving skills; (iii) interpersonal skills; (iv) analytical and decision-making skills; and (v) research, writing, and presentation skills.

A. *Business Lawyering Skills*

1. *Strategic-Planning Skills*

The ability to foresee the implications of choice of entity, financing, governance, and other decisions at the outset is essential in planning for a business’ long-term success, and therefore essential for business lawyers. Such knowledge allows business lawyers to “create a structure that is suitable both for the present and for the changes that will be needed for later financing”<sup>34</sup> and other growth strategies. In addition to predicting structural changes to a business, the ability to anticipate potential problems amongst stakeholders enables transactional lawyers to effectively implement strategies that minimize complications and maximize successes.<sup>35</sup>

2. *Problem-Solving Skills*

Although strategic planning helps minimize future challenges, challenges are inevitable. Skillful business lawyers know how to ensure that new problems “will be smaller than the old, and the new problem[s] can also be solved.”<sup>36</sup> In an era where business laws and norms are constantly changing, problem solving requires business lawyers to be entrepreneurial. “[C]reativity is indispensable ‘where a client comes in with a new technology or a new problem and there is no form book to go to and change the dates and names.’”<sup>37</sup> For example, at the time

---

<sup>33</sup> Schwarcz, *supra* note 1, at 495.

<sup>34</sup> Dent, *supra* note 1, at 308.

<sup>35</sup> *See id.* at 302–03.

<sup>36</sup> *Id.* at 309; *see also* John Coates et al., *What Courses Should Law Students Take? Harvard’s Largest Employers Weigh In*, 64 J. LEGAL EDUC. (forthcoming 2015) (manuscript at 6), available at <http://blogs.law.harvard.edu/hnmcp/files/2014/02/What-courses-should-law-students-take-Harvard-largest-employers-weigh-in.pdf>.

<sup>37</sup> Dent, *supra* note 1, at 317 (quoting Lawrence M. Friedman et al., *Law, Lawyers, and Legal Practice in Silicon Valley: A Preliminary Report*, 64 IND. L.J. 555, 562 (1989)).

that George Dent wrote his seminal piece on business lawyers, angel investing was a relatively new and evolving area of law without standardized terms.<sup>38</sup>

### 3. *Interpersonal Skills*

Effective interpersonal skills can improve lawyers’ prediction-making and problem-solving skills. In order to fully understand a client’s business context, goals, and potential hurdles, the business lawyer must have “interviewing and counseling skills that will assist her in obtaining information from clients and other parties.”<sup>39</sup> This includes employing empathy by asking “client-oriented questions and learning to listen as a client might listen.”<sup>40</sup> Effective communication with clients enables the business lawyer to more closely match legal options with client needs.<sup>41</sup>

In addition to effective information gathering and communication skills, the transactional lawyer must foster trust and promote cooperation, both through demeanor and substantive positions.<sup>42</sup> The ability to speak in familiar business terms is essential to both gathering the right information and gaining a client’s trust.<sup>43</sup> Complex legal terms can make clients feel uncomfortable and can signal to parties that any future disputes will be resolved legally as opposed to amicably.<sup>44</sup> Finally, the effective business lawyer understands the value of teamwork<sup>45</sup> and explains to clients “what work is needed and why.”<sup>46</sup>

---

<sup>38</sup> See *id.* The current business environment also requires transactional lawyers to be quick studies. In addition to aiding the development of new corporate forms and financing strategies, globalization has increased the need for transactional lawyers to simultaneously understand the laws of several national and international jurisdictions and the resulting ethical implications. *Id.* at 305–07, 317.

<sup>39</sup> Lisa Penland, *What a Transactional Lawyer Needs to Know: Identifying and Implementing Competencies for Transactional Lawyers*, 5 J. ASS’N LEGAL WRITING DIRECTORS 118, 125 (2008).

<sup>40</sup> W. David East et al., *Teaching Transactional Skills and Tasks Other Than Contract Drafting*, 12 TRANSACTIONS: TENN. J. BUS. L. (SPECIAL REPORT) 217, 237 (2011).

<sup>41</sup> See Anne M. Tucker, *Teaching LLCs by Design*, 71 WASH. & LEE L. REV. 525, 559 & n.100 (2014).

<sup>42</sup> Dent, *supra* note 1, at 311–12.

<sup>43</sup> See *id.* at 311.

<sup>44</sup> *Id.*

<sup>45</sup> Coates et al., *supra* note 36, at 6 (“teamwork” rated second most important skill for business lawyers to possess); see Dent, *supra* note 1, at 312.

<sup>46</sup> Dent, *supra* note 1, at 314.

#### 4. *Analytical and Decision-Making Skills*

Business lawyers also must be comfortable with “decision-making under uncertainty.”<sup>47</sup> No strategy will effectively resolve every issue, thus transactional lawyers “must decide what issues can be left open until later and which should be resolved at the outset.”<sup>48</sup> Because most business clients are ideally long-term clients, the ability to “distinguish what’s important and cost-effective for the client, and what’s not” is a key legal skill that can be accomplished in a client-centered manner, as discussed below.<sup>49</sup>

#### 5. *Research, Writing, and Presentation Skills*

Finally, legal research and writing skills are extremely important to any lawyer, including the business lawyer. Business lawyers’ tasks include drafting contracts, opinion letters, and other transactional documents. In addition to requiring writing, reviewing, and editing skills, these tasks require the ability to research transactional issues unique to clients’ needs.<sup>50</sup> Counseling a business client requires the ability to present information and options interestingly and effectively. Finally, professionalism is an important skill that is also directly tied to success and client satisfaction.<sup>51</sup>

#### B. *The Client-Centered Approach*

In sum, the articulated skill set requires the business lawyer to (i) understand the client’s business in order to create a strategic plan, (ii) engage in creative legal and non-legal problem solving, (iii) listen and gain the trust of the client, (iv) analyze the benefits or drawbacks of a particular option, and (v) effectively communicate those risks and rewards to the client. This skill set is enhanced by “client-centered lawyering,” or lawyering in a manner that respects the client’s autonomy to make decisions.<sup>52</sup> The client-centered lawyer “aim[s] to

---

<sup>47</sup> Michelle M. Harner & Robert J. Rhee, *Deal Deconstructions, Case Studies, and Case Simulations: Toward Practice Readiness with New Pedagogies in Teaching Business and Transactional Law*, 3 AM. U. BUS. L. REV. 81, 85 (2014).

<sup>48</sup> See Dent, *supra* note 1, at 308.

<sup>49</sup> See *id.* at 314.

<sup>50</sup> See Penland, *supra* note 39, at 123–24.

<sup>51</sup> See Tucker, *supra* note 41, at 54950.

<sup>52</sup> The client-centered approach to lawyering is one of the most widely used theories of lawyering taught in law school clinics today. The theory was first introduced by David Binder and Susan Price in 1977. DAVID A. BINDER & SUSAN C. PRICE, *LEGAL INTERVIEWING AND COUNSELING: A CLIENT-CENTERED APPROACH* (1977). The text’s second edition, published in 1991, was co-

assist a client to make choices and to proceed with her legal work in ways which reflect *the client’s* preferences, values, goals, and commitments,” and not those of the lawyer or student attorney.<sup>53</sup>

The client-centered approach, first conceptualized by David Binder and Susan Price in 1977 to apply to individual client representation, places the client at the center of a lawyer’s work in two fundamental ways: (1) by requiring lawyers to listen to clients, to listen to the founders’ stories of how or why they launched the social enterprise, to listen to the founders’ explicit and implicit goals for the social enterprise, and (2) by “demand[ing] that clients have a meaningful role in making decisions about their cases” and do not merely ratify or reject the advice of their lawyers.<sup>54</sup>

Binder and Price conceptualize legal representation as problem solving. Clients come to lawyers seeking help to solve problems, and thus “lawyers’ principal societal role is to help clients resolve problems, not merely to identify and apply legal rules.”<sup>55</sup> Client-centered counseling is a legal counseling process designed to foster client decision-making. Its goal is “not only to provide opportunities for clients to make decisions themselves but also to enhance the likelihood that the decisions are truly the client’s and not the lawyer’s.”<sup>56</sup> Binder and Price’s work, based on psychological theory, laid out a set of techniques used to motivate client participation. The model is designed to “effectuate, to the greatest possible extent, the client’s autonomy.”<sup>57</sup>

Client-centered lawyering has become a hallmark of clinical legal education and the theory has evolved since Binder and Price’s original conceptualization. Binder and Price’s original theory espoused lawyer neutrality to the point that the theory dictated that, if asked directly for her opinion, a lawyer should refrain from making any suggestions relating to the differing possible

---

authored by Paul Bergan; some texts refer to the seminal work as just the product of Binder & Berman, while others refer to the later text of Binder, Bergman, and Price. DAVID A. BINDER, PAUL BERGMAN & SUSAN C. PRICE, *LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH* (1991). For additional discussions of client-centered lawyering see, for example, Robert D. Dinerstein, *Client-Centered Counseling: Reappraisal and Refinement*, 32 ARIZ. L. REV. 501 (1990), Katherine R. Kruse, *Fortress in the Sand: The Plural Values of Client-Centered Representation*, 12 CLINICAL L. REV. 369 (2006), and Ann Shalleck, *Constructions of the Client Within Legal Education*, 45 STAN. L. REV. 1731 (1993).

<sup>53</sup> ALICIA ALVAREZ & PAUL R. TREMBLAY, *INTRODUCTION TO TRANSACTIONAL LAWYERING PRACTICE* 111 (2013).

<sup>54</sup> Kruse, *supra* note 52, at 370; see Shalleck, *supra* note 52, at 1742.

<sup>55</sup> BINDER, BERGMAN & PRICE, *supra* note 52, at 2, 5.

<sup>56</sup> Dinerstein, *supra* note 52, at 507.

<sup>57</sup> Donald G. Gifford, *The Synthesis of Legal Counseling and Negotiation Models: Preserving Client-Centered Advocacy in the Negotiation Context*, 34 UCLA L. REV. 811, 819 (1987).

courses of action.<sup>58</sup> Later conceptualizations of the client-centered lawyer, particularly in the representation of organizational clients, soften this neutrality principle.<sup>59</sup> A transactional client-centered approach does not require accepting the client’s initial goals or preferences articulated at the outset of representation, but the continued exploration of the client’s explicit and implicit preferences, goals, and even harmful biases.<sup>60</sup> Client-centered lawyering, at its best, is when it

involves an exchange of information, knowledge and perspectives between client and lawyer, from which both parties and the quality of the legal representation gain. Key to this dialogic process, however, is the ultimate right of the client to decide on both the goals and the means used in the legal representation.<sup>61</sup>

#### IV. IDENTIFYING A SOCIAL ENTREPRENEUR’S GOALS

The client-centered approach is particularly useful when applied to a group of actors—such as social entrepreneurs and their clients—with different risk profiles and frames of reference. The client-centered approach requires the clinic student to focus on her social enterprise client’s preferences and goals and it forces her to recognize when she is inappropriately substituting her own risk aversion for the client’s risk proclivity.

Law students are not accustomed to focusing on client preferences and goals. Law students arrive in the clinic armed with legal knowledge and research skills, but have never been responsible for a client representation. Thus, if a client intake form indicates that the client needs the clinic’s assistance with incorporating as a nonprofit and obtaining federal tax-exempt recognition, the novice clinic student may incorrectly suppose that the client’s goal is to become a nonprofit organization. In the clinic, we spend a considerable amount of time discussing the client-centered approach and, particularly, the skill of goal identification. *Why does the client think it needs to be a nonprofit? What does the client hope to gain by becoming a nonprofit? Is becoming a nonprofit the client’s goal, or a means to the client’s goal?*

In the clinic, we spend two seminar classes on interviewing, which include elongated discussions of goal identification as well as the differences between

---

<sup>58</sup> See BINDER & PRICE, *supra* note 52, at 186.

<sup>59</sup> BINDER, BERGMAN & PRICE, *supra* note 52, at 277, 288–89 & n.1.

<sup>60</sup> See ALVAREZ & TREMBLAY, *supra* note 53, at 109–25 (discussing client-centered counseling in the transactional law clinic setting).

<sup>61</sup> Susan D. Carle, *Power as a Factor in Lawyers’ Ethical Deliberation*, 35 HOFSTRA L. REV. 115, 131 (2006).

means and goals, and preferences and biases.<sup>62</sup> Outside of seminar time, students also participate in a simulation during which they must interview a simulated client. The interviews are taped and students are given detailed feedback as well as asked to write a reflection paper on their performance, which includes how well they performed on identifying the client’s goals. We spend multiple classes discussing inter-identity lawyering to teach clinic students that each actor in the attorney-client relationship has a different frame of reference, including different risk profiles, preferences, and biases that impact goal-setting. After initial interviews with their clients, clinic students must reflect on the inter-identity aspects of their attorney-client relationships and how the varying backgrounds and frame of references may impact their attorney-client relationship.<sup>63</sup> Most clinic students have never had any business experience. Therefore, talking about inter-identity lawyering also helps students see how a person seemingly similar to them in some ways—race, sex, class—is actually different in others—experience, motivation, business knowledge. Being conscious of inter-identity aspects of the attorney-client relationship helps students to avoid substituting their own preferences, goals, and risk profiles for the client’s; it also helps students seek to understand their client’s goals where those goals are widely divergent from their own.

After the first few client meetings, once a clinic student has begun to grasp her client’s goals, she then recapitulates the goals to her client to confirm her understanding. More often than not, during this discussion, clients modify the student attorney’s understanding of the client’s goals. Sometimes new goals are added. The student attorney conducts her research and analysis with her client’s goals in mind. Throughout the semester, we frequently discuss the articulated client’s goals in team meetings between the students and instructors.

We then spend at least one seminar session on client-counseling skills, which involves revisiting the client’s goals. In preparation to counsel a client, students may not just apply law to the facts, but are also required apply the law to the client’s goal expression. This three-dimensional approach is best illustrated using a pictograph. Pictographs are visual representations of data or other information. We use them in the clinic to present to the client qualitative information representing the quality of the strategy, program, or choice being evaluated. While students must also draft memoranda for their clients analyzing the law and applying the law to their client’s particular set of facts and goals,

---

<sup>62</sup> ALVAREZ & TREMBLAY, *supra* note 53, at 122–25 (describing the “anchoring bias” and “self-serving bias”).

<sup>63</sup> For this reflection, I use in-class exercises from Sue Bryant & Jean Koh Peters, *Five Habits for Cross-Cultural Lawyering*, in RACE, CULTURE, PSYCHOLOGY, & LAW 47, 51–60 (Kimberley Holt Barrett & William H. George eds., 2005).

pictographs are effective visual representations of such analysis. Importantly, the pictograph that we use requires a three-dimensional approach encompassing the client’s options, the student attorney’s legal analysis, and the client’s goals. The three-dimensional pictograph forces student attorneys to be client-centered and frame their solutions with respect to the client’s goals and preferences. And by extension, framing the client’s goals and preferences reduces the student’s ability to substitute her own risk profile for her client’s. In the next Part, I further describe the use of these pictographs through two mini-case studies of social enterprise clients.

## V. PICTOGRAPHS AND SOCIAL ENTREPRENEURS: MINI-CASE STUDIES

Above I profiled two social entrepreneurs with respect to their preferences and risk proclivity. Although too simplistic, for the purposes of the rest of this Essay I refer to them as “dual-mission” and “mission-driven” social entrepreneurs. Here, I present two examples of the ways in which students are required to be client-centered in their approach to counseling their social enterprise clients. For confidentiality purposes, the examples below are an amalgam of various clients and do not represent any individual clinic client. Client and student names below are also fictional.

### A. *Counseling the Dual-Mission Social Entrepreneur*

In this mini-case study, the dual-mission social entrepreneur has been running a for-profit social enterprise that has had some success. The social enterprise is organized as a limited liability company that accepts donations on behalf of charities, but the founder is considering expansion to directly engage in philanthropic programs. Although I have already discussed the scope of legal services with this client before the semester starts, the students prepare an initial interview outline that prioritizes determining the founder’s goals. They ask many open-ended questions such as: *Why did you start the for-profit LLC? What is its mission? How does it work? Why do you want to expand? What will that expansion look like? Who will be involved? Will the mission expand?* This open-ended questioning gives the founder ample opportunity to present her story, her goals, her vision, and her expectations. The students, of course, ask detailed questions as well, but they also understand that subsequent conversations with the client can be used to get the facts straight. This first interaction is about getting



the client’s story and building rapport.<sup>64</sup> During the meeting, the students also recapitulate what the client has said to obtain the client’s confirmation of their understanding.

After the meeting, the students meet to summarize the meeting and their thoughts and identify the client’s goals, which include both those that have been initially explained to them as well as the goals that they perceive. They then send a letter to the client confirming their work, but more importantly the client’s goals.

Dear Timothy:

Thank you for meeting with us. We really enjoyed learning about your organization and your plans for expansion.

Based on our initial meeting, we have identified the legal matters with which we will assist you:

(1) Advise you on the options that can meet your primary goals of (i) expanding the number of organizations to which donors can give as well as (ii) operating a program that serves [xyz] population.

(2) After we discuss your options, and if appropriate, we will assist you in facilitating the options you decide.

Please let us know if we’ve adequately outlined your goals and our work for you, based on our initial meeting. We will be in contact with you again soon regarding the next steps. Please do not hesitate to reach out to us with any questions or concerns. We are very excited to work with you this semester to help your organization achieve its goals.

Sincerely,

Jocelyn & Naomi, Student Attorneys

Notably, the client goals that the students express do not include “formation of a nonprofit corporation.” Forming an entity is the means to an end, not the ultimate

---

<sup>64</sup> ALVAREZ & TREMBLAY, *supra* note 53, at 23 (describing the goals for an initial interview as “getting information and developing an effective relationship”).

goal. Through the process described in Part IV of this Essay, students learn to distinguish means from goals.

Often, clients—particularly dual-mission social entrepreneurs or nonprofit founders—may be reluctant to express their personal goals. This is because the idea of personal gain (usually monetary) is generally taboo in the nonprofit sector, and to some extent in the social enterprise sector. People are expected to subsume their personal interests for the greater good.

This social entrepreneur, a recent MBA graduate, mentions several times throughout the semester that he was job hunting. As the semester progresses, the students realize that one of the client’s top priorities is to expand his operations in order to turn his part-time work through the limited liability company into a viable full-time job. This client, a dual-mission entrepreneur, does not want to launch a second, nonprofit organization on a part-time basis, despite the fact that most new nonprofits operate with volunteer staff. The student attorneys realize that this dual-mission entrepreneur is dedicated to expanding the limited liability company’s social impact, but only if the idea would work, and work quickly. The student attorneys incorporate this newly identified client goal into their legal analysis and client counseling. The student attorneys identify a few other client goals as well, which include expanding the platform for the technology that the social entrepreneur has developed, as well as administrative ease and feasibility of operating a lean company.

The student attorneys conduct their legal research and analysis with the client’s goals in mind. However, they do not let the client’s goals limit them because the client’s goals can shift when the client is presented with new information. The students lay out the options, including the legal requirements of each. They then assess the generally applicable advantages and disadvantages of each, as well as the advantages and disadvantages with respect to the client’s goals. Although they draft a legal memo for the client presenting the options with their analysis, they also work to present the information to the client visually. Here, they turn to a pictograph, specifically the unfortunately named “Booz Balls,” often used by management consultants.

The Booz Balls system is an analysis tool used to assess strategies, programs, products, and companies with respect to particular criteria. Booz Balls, which were developed by a Booz Allen Hamilton consultant in the 1970s, are a series of circles that are assigned “fill levels” (e.g. blank, partially filled, and completely filled) based on the degree to which a particular “item” meets particular criteria.<sup>65</sup> A blank ball means that the option does not meet the criteria,

---

<sup>65</sup> JOEL KATZ, DESIGNING INFORMATION: HUMAN FACTORS AND COMMON SENSE IN INFORMATION DESIGN 65 (2012).

a partially filled ball means that the option partially meets the criteria, and a completely filled ball means that the option satisfies the criteria. Exhibit 1 of the Appendix to this Essay presents the Booz Balls and their corresponding values, ranging from “goal not met” to “goal met.”

Booz Balls are especially useful in simplifying and comparing data. In the business context, Booz Balls can help inform decisions regarding choice of entity, finance structure, governance, and other variable-dependent choices. I did not initiate the use of Booz Balls to the clinic. A student attorney introduced the concept when preparing to counsel one of the clinic’s first clients. The concept quickly spread as his peers adopted it, and Booz Balls have become a standard tool in clinic students’ presentations to clients each semester. The students use Booz Balls to ensure that they are focused on the client’s goals, that they are not substituting their own risk proclivities or preferences for the client’s, and that they are providing the client with all options and information that the client needs to make a decision. Booz Balls enable students to do this because the analysis system requires mapping out options not just with respect to pros and cons (a two-dimensional analysis), but with respect to pros and cons *as applied to the client’s goals* (a three-dimensional analysis). The top row presents the legal options, the first column states the client’s goals, and the interior rows reflect the student attorneys’ analysis of how well each option meets the client’s goals.

The shortcomings of using the pictograph are threefold. First, each row visually depicts the client’s goals as having equal value—the rows are the same height. Realistically, the client is likely to have preferences amongst her goals and not give each the same value. Second, the level at which the Booz Balls are filled in (i.e., not filled, partially filled, or completely filled) are dependent on the student attorneys’ legal analysis of the pros and cons of the option; legal analysis is a subjective undertaking. The student attorneys attempt to counter these first two shortcomings by making them explicitly known to the client. The student attorneys ask the client for feedback on her goal priorities, as well as feedback on the student attorneys’ application of the law to the facts, as they discuss the pictographs. Often, the client and student attorneys will actively revise the chart during their discussion, based on the client’s feedback.

Thirdly, because they are visual, the pictographs do not fully present the legal analysis undertaken by the student attorneys, and a particular factor or piece of analysis that the students discuss orally may be missed or go unheard by the client. For this reason, the student attorneys always draft a legal memo to the client presenting their research and legal analysis. The pictographs are also just one part of the presentation that student attorneys give—the pictographs are used towards the end of the meeting to summarize the information already discussed and presented. Additionally, if there is an important distinguishing factor or piece of analysis not to be missed in the summary, the student attorneys may put that

factor in the “goals” column. For example, a client may not express as a goal that she wants the organization to be able to receive donations that are tax-deductible, but this is a feature of 501(c)(3) tax-exempt organizations that is important to distinguish.

Turning back to the dual-mission social entrepreneur, the students place the various options to achieving their client’s goals on the top row of the pictograph, as shown in Exhibit 2 to this Essay’s Appendix. These options include (1) sticking with the status quo, i.e., continuing to operate the for-profit entity; (2) operating two organizations (the for-profit LLC and a nonprofit corporation) in tandem; (3) operating two organizations with the existing for-profit LLC as the subsidiary of a newly-formed nonprofit corporation; and (4) dissolving the existing for-profit LLC and putting all operations into a new nonprofit corporation.<sup>66</sup>

With the pictograph, the client is able to visually see her goals, the options, and how each option may or may not meet her goals. This pictograph works particularly well for the dual-mission social entrepreneur because there is no single viable option that completely meets all of the client’s goals. Visually, there is no row in which the Booz Balls are completely filled across. The dual-mission social entrepreneur wants to pursue both profit and mission, which is legally challenging to accomplish. Typically, traditional investors will not capitalize a social mission. Pursuing a social mission thus requires subsidization in the form of tax-deductible donations and tax-exempt recognition from the IRS.

Conversely, pursuing profit in the nonprofit form is restricted. The doctrine of private benefit dictates that a nonprofit cannot be used to unjustly enrich an individual,<sup>67</sup> and the doctrine of private inurement prohibits nonprofits from unjustly enriching insiders, i.e., those controlling the organization such as board directors and officers.<sup>68</sup> Additionally, nonprofit laws constrain the nonprofit when it engages in commercial activities.<sup>69</sup> Simply put, the dual-mission social entrepreneur cannot “have her cake and eat it too.” The student attorneys use the

---

<sup>66</sup> Additionally, for any option involving a nonprofit corporation, the client can consider a fiscal sponsorship with an established nonprofit.

<sup>67</sup> “[I]t is necessary for an organization to establish that it is not organized or operated for the benefit of private interests such as designated individuals, the creator or his family, shareholders of the organization, or persons controlled, directly or indirectly, by such private interests.” Treas. Reg. § 1.501(c)(3)-1(d)(1)(ii) (2014).

<sup>68</sup> Only organizations “no part of the net earnings of which inures to the benefit of any private shareholder or individual” may be exempt under Internal Revenue Code § 501(c)(3). 26 U.S.C. § 501(c)(3) (2012).

<sup>69</sup> 501(c) organizations pay unrelated business income tax on taxable income generated from commercial activities that are regularly carried on and not substantially related to the organization’s exempt purpose. 26 U.S.C. §§ 511, 513(a).

pictograph to depict this dilemma for the dual-mission social entrepreneur. The student attorney’s presentation will help the client possibly rethink and reframe her goals given that no single option meets all of her goals.

However, before the client meeting and in a supervision meeting without the client, the student attorneys express their preferences for options 3 and 4. They worry that the client will select option 2, which entails operating an LLC and nonprofit in tandem. The student attorneys view this option as the riskiest choice. Based on their research, they know that the IRS may scrutinize the relationship between the LLC and nonprofit and deny the nonprofit corporation tax-exempt status. The student attorneys also know that if the IRS does grant the nonprofit tax-exempt status, the dual-mission social entrepreneur will have the additional administrative burden of maintaining two organizations separately so as to avoid any impermissible private gain flowing to the LLC. The student attorneys worry about the dual-mission social entrepreneur’s capability and bandwidth to operate two organizations given that he has another part-time job. In this supervisory meeting, we discuss these concerns and the pictographs become a tool for the supervisor to reiterate and remind the student attorneys of the client-centered approach:

Student: *We’re worried that the client is going to try to operate the LLC alongside a nonprofit.*

Supervisor: *Let’s take a step back. What is your goal for the client meeting?*

Student: *To present the client with options.*

Supervisor: *What is the goal of presenting these options?*

Student: *Oh right. To help the client to make an informed choice.*

Supervisor: *Are you satisfied that you’ve conducted all of the necessary research? Are you giving the client all of the information that she needs? Does the pictograph represent all of the client’s available options?*

Student: *Yes.*

Supervisor: *Have you applied your research to the facts? Stated any nuances or unknowns? Have you applied your research and the facts to the clients’ goals?*

Student: *Yes, yes, yes. But we still really feel like the client should go with option 3 or 4.*

Supervisor: *But what is your role? What is your goal? To guide the client to the choice that you would chose? Who has to live with the choice that will be made?*

This discussion ideally ends with the student attorneys gaining a deeper understanding of client-centered lawyering. The student attorneys begin to

understand that even if they prefer a particular choice, they should not foist it onto their client. The student attorneys also understand that they are helping their client by presenting all of the available options and acting as a sounding board to the client as she thinks through her choices. Where they see risk, the client may see opportunity, or perhaps a way to mitigate that risk.

*B. Counseling the Mission-Driven Social Entrepreneur*

In this mini-case study, the mission-driven social entrepreneur comes to the clinic for legal representation because he has heard about “this new thing called a benefit corporation.” The mission-driven social entrepreneur is launching a for-profit business and is certain that he wants it to be a benefit corporation. The student attorneys recognize and respect their client’s preference to become a benefit corporation, but seek to act as a sounding board for their client to ensure that he is fully informed about the benefit corporation’s legal requirements, as well as apprised of his other options. Their goal is for the client to make *an informed decision*. As explained by Tremblay and Alvarez:

Most legal matters . . . involve multiple alternative actions, uncertainties about each, assessments of levels of risk, trade-offs in results, and imperfect predictions about what some other people are likely to do in the future, and about how the participants will feel about the choices in the future. A smart and wise lawyer will recognize the relevant alternatives, describe the inherent uncertainties, offer reliable predictions about other participants’ likely behaviors and feelings, and assess the risk levels. But then, once the lawyer has performed her role and communicated all of that critical information to her client, only the client can choose among the available alternatives based on factors peculiarly within the client’s competence.<sup>70</sup>

In sum, the lawyer provides the analysis and information, but the client makes the decision because the lawyer cannot fully know the client’s preferences, values, or risk tolerance.

In their initial interview with the client, the student attorneys ask open-ended questions regarding his request to form a benefit corporation. This helps the student attorneys understand their client’s goals and preferences, and to hear his story: *Where did you hear about the benefit corporation form? Why do you want*

---

<sup>70</sup> ALVAREZ & TREMBLAY, *supra* note 53, at 112. Alvarez and Tremblay recognize that some legal matters are definitive (e.g., comply with the law or face a penalty), but most are not. *See id.*

*to form a benefit corporation? What do you envision as its mission? What will the company do/sell/produce? What goals have you set for yourself in the short-term life of the company? Long-term goals?*

The student attorneys discover that their client wants his company to be a benefit corporation because he believes that it will open doors for the company, which will be operating in an industry that is generally ill-perceived by customers and the public at large. He seeks to provide a reputable, socially accountable alternative to the competition that already exists, and he seeks to offer a service that benefits customers more than it enriches the company.

The student attorneys incorporate their client goals into their research plan, but do not limit their work to the client’s request to form a benefit corporation. The expressed means (“a benefit corporation”) may or may not fit with the client’s goals (“authenticity and legitimacy in a poorly perceived industry”). They expand their research beyond benefit corporations to other forms such as corporations and limited liability companies, as well as research social impact strategies that can be used regardless of what entity is ultimately chosen.

Although their client has heard of the benefit corporation form, the student attorneys discover that he does not know what legal requirements it entails. At the outset, the mission-driven social entrepreneur is seemingly willing to constrain his for-profit company in order to pursue a social mission, but to what extent? After writing a legal memo that presents their research and analysis, the student attorneys counsel the client using, in part, the Booz Balls. Exhibit 3 is the pictograph the student attorneys present to the client. The top row presents four entity forms for the client to consider, which includes (1) a Delaware public benefit corporation, (2) a benefit corporation, (3) a corporation, and (4) a limited liability company. The student attorneys explain each entity form, including how it is formed and managed, its legal requirements, any distinguishing characteristics, its tax implications, and the generally perceived advantages and disadvantages of each.

The student attorneys also compare the forms. They explain that depending on the industry, a closely-held, privately owned company, formed as either a corporation or a limited liability company, has few to no reporting requirements<sup>71</sup> and does not have to make its operating or financial information

---

<sup>71</sup> For example, a corporation must file its charter or articles of incorporation with the state in which it incorporates. However, the charter is a formation document and contains nothing more than basic financial or governance information, such as the number of authorized shares or shareholder rights. A private company does have to register under section 12(g) of the Securities Exchange Act of 1934 if it has more than \$10 million in total assets and 500 or more record holders of a class of equity security who are not accredited investors (unless the company has an exemption from registration). Securities Exchange Act of 1934, ch. 404, 15 U.S.C. § 78l(g) (2012).

publicly available. Closely-held, private companies need not be transparent or publicly accountable, unless in an industry that specifically regulates disclosure.

The benefit corporation requires disclosure requirements and accountability mechanisms not required of a closely-held, private company. In most states, a benefit corporation must assess its performance in achieving a general public benefit using a third-party standard, and then make the results of its assessment publicly available in a benefit report.<sup>72</sup> Many states also require an independent benefit director to sit on the board of directors to provide mission-accountability, i.e. to certify whether the public benefit corporation has “acted in accordance with its general public benefit purpose and any specific public benefit purpose in all material respects during the period covered by the [benefit] report.”<sup>73</sup>

Additionally, benefit corporations have operational and administrative requirements above and beyond what is required of a corporation or limited liability company. For example, because the board of directors of a benefit corporation must consider its stakeholders in making decisions,<sup>74</sup> the board must

---

<sup>72</sup> The model benefit corporation statute requires a benefit report to include: (1) A narrative description of: (A) The process and rationale for selecting the third-party standard used to prepare the benefit report; (B) The ways in which the benefit corporation pursued general public benefit during the year and the extent to which general public benefit was created; and (C) Any circumstances that have hindered the pursuit or creation of the general public benefit purpose and any specific public benefit purpose; (2) An assessment of the benefit corporation’s overall social and environmental performance against a third-party standard; (3) The benefit director’s name and address; (4) The compensation the benefit corporation paid during the year to each director in his or her capacity as director; (5) The name of each person who owns five percent or more of the benefit corporation’s outstanding shares; (6) The benefit director statement; and (7) A statement of any connection between the organization that established the third-party standard, or its directors, officers, or material owners, and the benefit corporation or its directors, officers, or material shareholders, including any financial or governance relationship which might materially affect the credibility of the use of the third-party standard. MODEL BENEFIT CORP. LEGIS. § 401 (B Lab 2014).

Delaware law requires that a public benefit corporation provide “a statement as to the corporation’s promotion of the public benefit or public benefits identified in the certificate of incorporation and of the best interests of those materially affected by the corporation’s conduct” to shareholders every two years. The public benefit report must include: “(1) The objectives the board of directors has established to promote such public benefit or public benefits and interests; (2) The standards the board of directors has adopted to measure the corporation’s progress in promoting such public benefit or public benefits and interests; (3) Objective factual information based on those standards regarding the corporation’s success in meeting the objectives for promoting such public benefit or public benefits and interests; and (4) An assessment of the corporation’s success in meeting the objectives and promoting such public benefit or public benefits and interests.” DEL. CODE ANN. tit. 8, § 366 (2015).

<sup>73</sup> MODEL BENEFIT CORP. LEGIS. § 302(a)–(c).

<sup>74</sup> *Id.* at § 301(a).



put into place a process for such consideration, which might include a stakeholder governance policy. Because the benefit corporation must produce a benefit report, the board or officers must establish procedures for assessing the general public benefit. Each of these additional requirements can be costly and time-consuming for a new business that has few resources at hand. Finally, no case law or legal precedent interprets any provision of any state benefit corporation statute. This presents legal risk to adopting the benefit corporation form.

In sum, the benefit corporation form is a riskier endeavor than forming as a corporation or limited liability company not only due to the lack of legal precedent but also due to the possibility of failing to satisfy the ongoing legal requirements of the benefit corporation. Although there is no regulatory agency overseeing benefit corporation compliance, customers, third-party watchdogs, and the general public have the leverage to call out a benefit corporation’s noncompliance as social or environmental “greenwashing.”<sup>75</sup> Despite these risks, the student attorneys subsume their own possible risk aversion to the benefit corporation form. They present the client with their analysis of the risks in a neutral manner by presenting all entity options and tying each of the entity options to the client’s goals and key distinguishing factors from their legal analysis. These goals and features in the first column are: (1) authenticity and legitimacy in a poorly perceived industry, (2) donation of profits, (3) administrative and operational ease, and (4) legal precedent. The pictograph in Exhibit 3 presents these goals and factors in the first column. The Booz Balls in the middle of the pictograph summarize the student attorneys’ analysis.

Ultimately, the client decides to form a Delaware public benefit corporation because that form enables the client to promote and pursue a social mission while binding the company to fewer administrative and operational tasks than the benefit corporation form.

## VI. CONCLUSION

This Essay has described an approach to counseling social entrepreneurs in a manner that prioritizes the client’s values, preferences, and risk profile over those of the student attorney who may be risk averse. Pictographs are invaluable to this approach because they are three-dimensional and can visually depict the client’s options in relation to the client’s expressed goals and student attorneys’ legal analysis. A drawback of the client-centered approach is that the student attorney (or supervising attorney) can come to falsely believe that she has

---

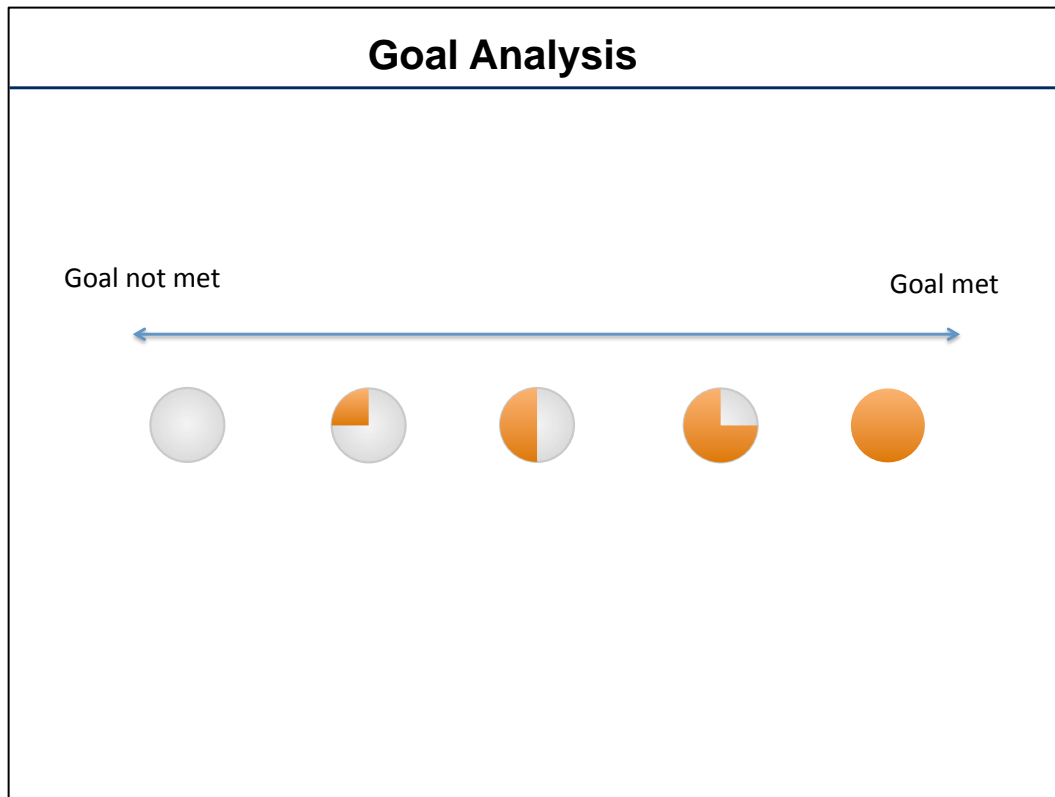
<sup>75</sup> The model legislation also allows a shareholder to sue the benefit corporation for noncompliance through a “benefit enforcement proceeding,” although no monetary recovery is permitted. *Id.* at § 305.

appropriately and fully identified the clients’ goals. It also assumes that clients can express their goals either directly or indirectly, when in reality, they may not be able to fully communicate or even know what their own goals are. Finally, goals are not static, and neither are values, preferences, or risk profiles. Each can change over time, with the introduction of new information, or for no reason at all. Nevertheless, this client-centered approach to lawyering enables students to avoid projecting their own risk aversion onto innovative social entrepreneurs, and to be creative problem solvers with their clients.

## Appendix

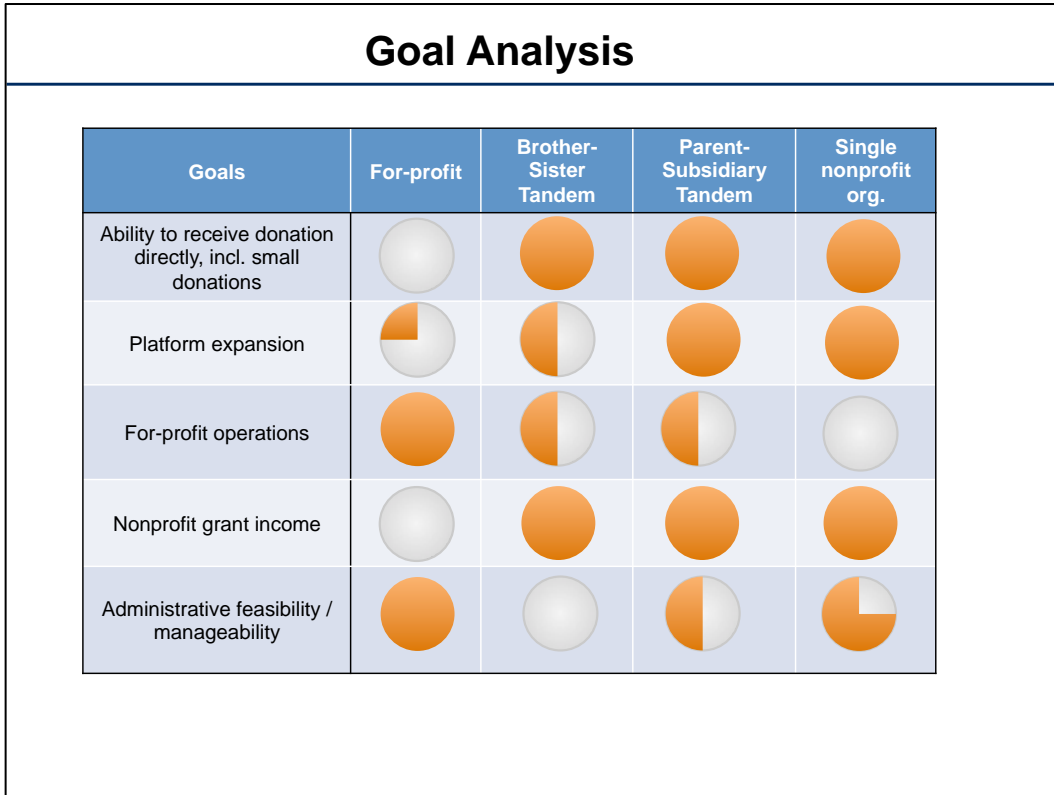
### *Pictograph Values*

*Exhibit 1.*



***Counseling the Dual-Mission Social Entrepreneur: Example Pictograph***

*Exhibit 2.*



***Counseling the Mission-Driven Social Entrepreneur: Example Pictograph***

*Exhibit 3.*

